IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1531

LEX TEX LTD INC., *Petitioner*,

v.

UNIVERSAL TEXTURED YARNS, INC., *et al.*, *Respondents*;

v.

BURLINGTON INDUSTRIES, INC., *Respondent*;

v.

HIALEAH KNITTING MILLS, INC., *et al.*, *Respondent*;

v.

CONCORDIA MANUFACTURING CO., INC., *Respondent*;

v.

GOLD MILLS, INC., *Respondent*.

BRIEF OF RESPONDENT BURLINGTON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION

Respondent, Burlington Industries, Inc., submits that the Petition sets forth no matter warranting review by this Court, and prays that certiorari be denied.

STATEMENT OF THE CASE

The action brought by Petitioner, Lex Tex Ltd., Inc. against Burlington Industries, Inc. was predicated upon allegations that (1) Burlington Industries, Inc. had "wrongly persuaded" certain other companies which had "user" license agreements with the Petitioner to breach those license agreements (presumably by halting royalty payments to Lex Tex) and (2) Burlington had uttered "misstatements" concerning Lex Tex's ownership of the three "double heater" patents identified in the Petition. Burlington Industries denied these allegations, and they were thoroughly discredited during the extensive discovery proceedings held in the District Court. However, after it was determined that the Lex Tex patents were unenforceable because of misuse, the District Court dismissed the complaint *sua sponte,* (App. 68a),* and the Court of Appeals affirmed the dismissal in its decision dated November 5, 1976 (App. 103a-104a), rehearing en banc denied February 3, 1977.

The Statement of the Case set forth in the Petition is deficient in that it fails to acknowledge that Petitioner's machinery manufacturing license program arose from, was patterned after, and was intertwined with the extensive machinery manufacturing license program previously initiated and maintained by the Leesona Corporation, which was also found by the Courts below to violate § 1 of the Sherman Act (App. 91a-94a). Lex Tex itself was the creation of Leesona Corporation and Leesona's co-conspirator, the Permatwist Company. The only two shareholders of Lex Tex

* References to "App. ——" herein are to the Appendices bound with the Petition.

were and are Leesona's patent counsel and the counsel for the Permatwist Company (App. 83a-84a). The various Lex Tex policies and contractual arrangements were formulated only after months of meetings and consultations by the principals of Leesona and Lex Tex. Leesona required its customers for post-treating machines to sign not only its own license, but also the Lex Tex license. Accordingly, it is deceptive for Lex Tex to now present its Petition in a manner to suggest that Lex Tex's activities were separate and independent in their scope, operation and effect from those previously conducted by Leesona. Rather, Lex Tex's licensing program should be viewed, as it was correctly viewed by the Courts below, as a superimposition on and extension of the previously maintained schemes of Leesona.

The Statement of the Case in the Petition is also deficient in that it fails to acknowledge other facts which were either admitted or undisputed by Lex Tex in the Courts below, and on which the decisions were properly predicated. For example, Lex Tex admitted, both in the District Court and in the Court below, that it offered the inducement of royalty kickbacks to "as many [machinery] manufacturers as possible" in order to encourage those manufacturers to make post-treating machinery falling within the scope of the Lex Tex patents so that Lex Tex could maximize its own royalty income. Indeed, in its appeal brief in the Court below, Lex Tex expressly said:

> "Obviously, Lex Tex, as a patent licensing company, has a strong interest in the development and sale of post-treating yarn texturizing machinery by *as many manufacturers as possible,* as Lex Tex's sole compensation comes from production

royalties collected. The more machines made and sold, *the greater the amount* of royalties. The [Lex Tex manufacturing license] agreements themselves reflect that in order to *encourage market entry,* to provide for additional machinery and to offset the expenses of servicing customers, *the manufacturers were afforded a share of the royalties collected* from the use of machines which were sold and serviced by manufacturing licensees. And the parties so testified. (Tecce depo., p. 889, 1079, 1011-14)" (emphasis supplied)

The Court below held that the system of Lex Tex royalty "kickbacks" to the manufacturers fixed an artificially high machinery price which served as the inducement to "encourage market entry", and which actually exceeded the price-fixing evils of the *Line Material* Case,

> ". . . because the non-patentee machinery manufacturers are left with less incentive to patronize alternative technology . . ." (App. 102a)

The Petition does not address itself to these matters and other indisputable facts which demonstrate the correctness of the decision below.

ARGUMENT

The Petitioner sets forth no supposed conflict between decisions of the several Courts of Appeal, no conflict with applicable decisions of this Court, no substantial and important question that requires decision, nor any other matter which calls for the exercise of this Court's power of supervision.

The Petition reveals only a dissatisfaction with the result reached by the Court below, but even then, Petitioner cannot point to a substantial factual or legal error in its decision. Each of the contentions now made in the Petition was also made by Lex Tex in its Petition for Rehearing and Suggestion for Rehearing En Banc, which was considered and denied by the Court of Appeals on February 3, 1977, or in its appeal brief.

"Question No. 1" presented by the Petition asserts that there is "no evidence" in the record to support the assumption allegedly made by the Court below, and which the Petition erroneously characterizes as a "keystone fact,"

> ". . . that the Lex Tex manufacturing licenses prevent negotiation between the throwsters and manufacturers concerning *the Lex Tex payment to* the manufacturer . . ." (Petition, p. 9)

While that statement might well prove correct, as the Court below anticipated, in the majority of cases, it is not a "keystone fact" and is wholly immaterial to the decision of the Court of Appeals.

Any negotiation between the purchaser of the machine and the manufacturer as to that portion of the royalty to be paid by Lex Tex to the manufacturer would be entirely immaterial to the price-fixing which was found. Indeed, the Court of Appeals had no occasion to be concerned with the precise amount received or retained by the manufacturer. The only point important to the decision below is that *some* agreed-upon payment (of whatever amount) by Lex Tex to the various manufacturers insured that the manufacturers would insist that their purchasers agree to pay royalty to Lex Tex, which royalty was fixed by Lex Tex, was an "important component" of the total price paid *by the purchaser* (93a), and was *not* subject to negotia-

tion between the seller and the buyer. This was the element of negotiation which was lacking, and which properly caused the Court of Appeals to find that:

> "Thus, by means of the royalty sharing arrangement between Leesona [Lex Tex] and the machinery manufacturers, the price of the machinery *which the throwsters would have to pay* was fixed." (App. 91a)

It was and is undisputed that the royalty to be paid by the purchaser over the life of his machine could amount to much more than the initial sales price of the machine (App. 91a), and the agreements between Lex Tex and the manufacturers thus established a uniform, arbitrary "floor" under the price of the machinery which limited, by their own acquiescence, the pricing freedom of the manufacturers. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). Thus, it is irrelevant, and in no way a "keystone fact", whether a specific manufacturer might negotiate with a favored customer for further splitting the portion of the royalty which it received from Lex Tex. The existence of some price competition is not antithetical to a § 1 violation, *United States* v. *Container Corporation of America,* 393 U.S. 333, 337 (1969), especially where, as here, there is interference with free market forces and "an agreed starting point" for pricing between competitors. *Plymouth Dealer's Association of Northern California* v. *United States,* 279 F.2d 128 (9th Cir. 1960); *United States* v. *Socony-Vacuum, supra,* at 310 U.S. 220. The pernicious effect of price-fixing among sellers, of course, is that it tends to raise or stabilize the price to be paid by their customers. Here, it is undeniable that in every case the total price paid by

the purchasers was raised by the manufacturers' participation in the Lex Tex-Leesona schemes.

The series of agreements whereby Lex Tex and Leesona, by allocating a portion of their compensation to the manufacturers, purchased the manufacturers' participation in their schemes, were *per se* unlawful. None of the evidence or contentions now offered by Petitioner raise any genuine issue as to any fact essential to this *per se* illegality, or undermine in any way the appropriateness of the summary judgment that was affirmed by the Court of Appeals.

"Question No. 2" presented by the Petition presents no inconsistency with the *Line Material* decision or with any other decision of this Court.

Adopting an excessively restrictive view of this Court's decision in *United States* v. *Line Material,* 333 U.S. 287 (1948), the Petitioner argues that it is not a competitor of the machinery manufacturers in the sales of machinery, that the agreements did not set a specific price on the machinery and that there was in fact no cross-licensing or licensing of the patents as between Lex Tex and the manufacturers.

These three arguments in no way conflict with this Court's decision in *Line Material,* and they are also answered by other decisions which antedate *Line Material* and on which *Line Material* was based. It has long been clear that § 1 of the Sherman Act reaches all price-fixing conspiracies, horizontal and vertical, and where one is found, it is not necessary that all participants be competitors one with the other. *United States* v. *Univis Lens Co.,* 316 U.S. 241 (1942); *Keifer-Stewart Co.* v. *Joseph E. Seagram & Sons,* 340 U.S. 211

(1951); *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944).

Answering Petitioner's second argument, this Court held, in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), that agreement on a specific dollar amount as a sales price was in no way essential to a price-fixing scheme. Indeed, that case involved a conspiracy in which the participants systematically purchased overproduction or "distress" gasoline at the going market price in order to prevent that gasoline from being sold at discount prices and thereby undermining and depressing the general market price for gasoline. No price whatever was fixed in the sense of a dollar amount, but instead the conspiracy had the effect of placing a "floor" under the market and preventing otherwise normal market price reductions. In rebutting a contention identical to that now made by Lex Tex, this Court stated at 310 U.S. p. 222:

> "Nor is it important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible. Price fixing as used in the Trenton Potteries Co. Case has no such limited meaning."

Finally, the Petitioner's argument that the Court below erroneously extended the rule of the *Line Material Case* to a situation which involved no cross-licenses between patent holders is without merit. The Court below, rather than extending *Line Material* to heretofore legitimate conduct, clearly viewed the Lex Tex activities as within the ambit of and even more pernicious than those present in *Line Material*. It said "[The Lex Tex] arrangement goes beyond the evils of *Line Material* . . ." (102a).

To see the correctness of that statement, it is useful to view the Petitioner's contentions, as the Court below did, in light of the historical perspectives of the *Line Material* decision. (App. 102a) Thus, if the Petitioner's present contention that its agreements with the machinery manufacturers were "not even . . . unilateral license[s]" (Petition p. 13) were correct, then Lex Tex would not have removed itself from the rationale of the *Line Material* Case, but would have waived the narrow protection previously afforded to a single patentee by the *General Electric* Case, 272 U.S. 476 (1926). Clearly, if the Lex Tex agreements are not *patent* license agreements of the type authorized by *General Electric* then they are nothing but naked price-fixing agreements which fell within the proscription of § 1 of the Sherman Act even before *Line Material.*

Further, as the Court of Appeals noted, the Lex Tex system of agreements contains abuses going beyond the *Line Material* situation because it serves as an inducement to machinery manufacturers to produce only those types of machinery which would arguably fall within the scope of the royalty claims by Lex Tex. Otherwise, the manufacturer would not be entitled to the substantial payment from Lex Tex. This, the Court concluded, left the machinery manufacturers with "less incentive to patronize alternative technology" (App. 102a) whether they were also patent holders or not.

The primary purpose of the Federal patent law is to stimulate science and technology. The primary objective is not individual reward to the patent owner, but the overall benefit to society, not only from the

particular patented invention, but from the stimulus to others to develop new, competing technology. *Motion Pictures Patents Co.* v. *Universal Films Mfg. Co.*, 243 U.S. 502, 510-511 (1917). Where that stimulus to new technology is thwarted, the patent system itself suffers injury. In *Line Material* this Court recognized:

> "The stimulus to seek competitive inventions is reduced by the mutually advantageous price fixing arrangement." (333 U.S. at 311)

Admittedly, Lex Tex's purpose was to encourage the manufacture of machinery which would fall within its patents, but not otherwise. By offering very substantial price inducements to "as many manufacturers as possible", Lex Tex inevitably reduced the stimulus to develop and produce competitive forms of post-treating equipment that would not command a royalty under the Lex Tex patents. The finding of misuse on the part of Lex Tex was clearly correct.

CONCLUSION

For the foregoing reasons, Respondent Burlington Industries, Inc. respectfully submits the Petition for Certiorari should be denied.

Respectfully submitted,

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